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ABSTRACT

The legal and historical concerns regarding education for minorities other than Blacks--with an emphasis on the story for Hispanics--are the subject of this paper. It is argued that although the same legal rules apply to Hispanics as apply to a Black minority, language isolation requires a different approach. Non-Black racial minorities have a right to a meaningful education with special attention to language needs. This special attention, however, cannot be used to permanently segregate Hispanic and other language minority children. It is argued that only older students--those well skilled in their native tongue--benefit from English as a Second Language programs, while younger children do better in an integrated setting. The paper concludes that the goals of integration and attention the language needs of these children are compatible. (Author/GC)

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LEC-83-14

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ABSTRACT

In this paper, Arias and Bray review the legal and historical concerns for minorities other than Blacks, with an emphasis on the story for Hispanics. They argue that, although the same legal rules apply to Hispanics as apply to a black minority, language isolation requires a different approach. They conclude that non-black racial minorities have a right to a meaningful education; and that this requires specific attention to the needs of those with limited English-speaking ability. This special attention to language needs, however, cannot be used to permanently segregate these children. They find that only older students, those who are well skilled in their native toungue, benefit from English as a Second Language (ESL) programs. Younger students do better in an integrated setting from the outset. They believe that the goals of integration and attention to the language needs of these children are compatible.

EQUAL EDUCATIONAL OPPORTUNITY AND SCHOOL DESEGREGATION IN TRIETHNIC DISTRICTS

By Dr. M. Beatriz Arias and Judith L. Bray/*\
September 1983

"Brown . . . was not written for Blacks alone . . . . The theme of our school desegregation cases extends to all racial minorities treated invidiously by a State or any of its agencies."/1\

INTRODUCTION

Nearly thirty years ago, in Brown v. Board of Education, the U.S. Supreme Court interpreted the Constitution to ban legally required (de jure) segregation in public schools./2\ This legal separation of white and black students, demanded a legal remedy: integration, a specific requirement to right the wrong. Courts see segregation of students based on their national origin as identical to segregation based on race.

In fact, just prior to Brown, the Supreme Court ruled on the constitutional rights of Mexican Americans. In a non-education context, the Court held that Mexican Americans were entitled to equal protection of the laws as a distinct and separate class under the Constitution./3\

Despite the recognition of constitutional entitlements for both Blacks and Mexican Americans since 1954, little scholarly attention has focused on the segregative practices experienced by Mexican Americans and other national origin minority students in the United States. The nature and consequences of dual discrimination experienced by these groups (racial isolation and linguistic exclusion) have been largely ignored. Thus, remedies to achieve equal educational opportunity have been poorly defined.

This paper will describe the history of judicial efforts toward equal educational opportunity and desegregation activity where Hispanics and/or national origin

minorities have been a significant part of the school population. It will elaborate on Hispanic involvement in desegregation cases, explore the ramifications of racial and linguistic isolation, and review approaches used by the courts for attaining equal educational opportunity in triethnic school districts.

BACKGROUND

Definition of Hispanics

Today, the number of Hispanics in the U.S. is growing at a phenomenal rate. In the last ten years, the Hispanic population has grown by over 61%, from nine million to over fourteen and a half million in 1980. Hispanic students are the second largest minority population enrolled in public schools, and are projected to outnumber Blacks by the year 2000./4\

The Hispanic population is comprised of several subgroups, Mexican Americans, Puerto Ricans, Central and South Americans, Cubans and "other Spanish." All students in these subgroups are designated as national origin minority (NOM) by virtue of their historical relationship to the Spanish language and culture, yet each individual student has different levels of bilingualism and each subgroup has been accommodated by the English dominant society in historically different ways.

Mexican Americans form the largest subgroup, numbering 7 million -- 59% of the U.S. Hispanic population./5\ Concentrated in the Southwest, they have had contact with English since the area was still a part of Mexico. Due to the conflicts and hostilities which characterized this acquisition by the United States, Spanish became identified as the language of the "conquered," and de-valued despite assurances to the contrary by the Treaty of Guadalupe Hidalgo./6\ Statistics from 1976 showed approximately 23% of this group to be English monolingual, 53% bilingual and 13% Spanish monolingual./7\

Puerto Ricans enjoy full U.S. citizenship, due to the territorial status of the island of Puerto Rico. Spanish is the language of instruction on the island and one of the two official languages of the Commonwealth. The 1976 data indicated only 13% to be English monolinguals, while 63% were bilingual./8\ Puerto Ricans in the United States currently number about two

million/9\ and most are concentrated in the industrial Northeast, particularly New York and New Jersey, and in Illinois.

Cubans number approximately .7 million/10\ and reside in large numbers in the South, particularly in Florida. Spanish is the official language of Cuba, and the political exiles, refugees and immigres of the island were active in ensuring that Spanish would be retained through the early implementation of bilingual education programs. In 1976, 23% of Cubans in the U.S. spoke no English, 69% were bilingual and only 3% were English monolingual./11\

"Hispanic," then, is a generic term which encompasses all these subgroups with different histories and patterns of assimilation in the dominant culture. The term is useful for identifying national origin minority students who share a common linguistic heritage yet display great variance in Spanish proficiency./12\ The regional distributions of Hispanic subgroups are important to remember in order to understand the history of each group's struggle to achieve equal educational opportunity. Geographically, while every state has Hispanics, 75% of this group are found in five states: California, Florida, New Mexico, New York and Texas./13\ Consequently, in reviewing desegregation cases, actions filed in these states are of primary interest.

Discrimination Against Hispanics

At least two kinds of intentional inequity toward Hispanics violate federal law. Segregation based on national origin is a violation of the Constitution's guarantee of equal protection of the laws. Failure to educate children by refusing to take into account their lack of English-speaking ability violates the Civil Rights Act of 1964./14\

Hispanic students have suffered the consequences of racial isolation and discriminatory practices based on the groups' appearance, language and cultural orientation. These practices have been documented through classroom assignment based on "language deficiency," weak enforcement of mandatory attendance laws; early grade retention; state supported unequal school conditions, and the use of linguistically and culturally biased assessment measures./15\

In a desegregation case, a court will look closely at both the history of a minority's isolation in education to determine the extent of the violation, and the

specific needs of the minority in question, in order to remedy that violation./16\ De jure segregation of Blacks prompted courts to find discriminatory intent in early desegregation cases. Although Hispanics were routinely separated from Anglos and Blacks into "language schools," the practice was not specifically mandated by state statute as in "southern" black segregation, nor did it result from state and local administrative policies, as in "northern" black segregation. Hispanics in the Southwest were assigned to separate schools by local rules which assumed a lack of English proficiency.

Legal Efforts: Pre-Brown

The first school desegregation case filed on behalf of Hispanics was Del Rio Independent School District v. Salvatierra in 1930. The Texas Supreme Court held that school officials "had no power to separate Mexican-Americans because they are Mexican-American." However, the court found that the language "deficiency" of these students justified separate classrooms, even separate buildings until the third grade. "In the opinion of the survey staff, it is wise to segregate, if it is done on educational grounds, and results in distinct efforts to provide the non-English speaking pupils with specially trained teachers and the necessary special training resources." Although the court recognized that segregation "has been used for the purpose of giving the Mexican children a shorter school year, inferior buildings, inferior equipment, and poorly paid teachers," the effect of Del Rio was to legitimize separation of Mexican Americans from Anglos based on language./17\ In reality, few Mexican American students at this time went beyond the third grade. Retention in the first grade for two to three years was not uncommon. Consequently, most of these students, whether they experienced a "language deficiency" or not, attended segregated schools in Texas.

In California, while the segregation of Hispanic students had also been explained on the basis of their "language handicap," their actual language proficiency had never been measured. In 1945, in Mendez v. Westminster, segregation of students on this basis was formally outlawed. In 1947, the United States Court of Appeals for the Ninth Circuit affirmed this decision, marking the first time that public school segregation had been denounced by the federal courts. "A paramount requisite in the American system of public education is social equality. It must be open to all children by

unified association regardless of lineage."/18\ Although significant, the decision had a practical impact only in the Ninth Circuit.

Segregation based on language was almost terminated in Delgado v. Bastrop./19\ The Delgado court found segregated schools for Mexican Americans to be unconstitutional in Texas, "language deficiency notwithstanding." However, the court allowed segregation for "educational purposes" to continue in the first grade.

Finally, in 1950 in Arizona, a court in Gonzalez v. Sheely held that the segregation of children of Mexican descent deprived them of their constitutional rights./20\ The cases litigated prior to Brown are similar in that they attempted to dismantle the segregated school system which was established on the rationale of linguistic differences. These cases did not, on the surface, consider that the segregation was due to racial or ethnic characteristics.

Legal Efforts: Post-Brown

The issue of separate consideration for Mexican American students in a multi-racial school district was established in Keyes v. Denver (1974)./21\ Here the court found that Mexican American students had experienced the injury of racial isolation. Thus, as a class, they were entitled to relief. However, the court rejected bilingual education as a remedy for racial discrimination: "Bilingual education is not a substitute for desegregation. Although bilingual instruction may be required to prevent isolation of minority students in a predominately Anglo school system . . . such a plan must be subordinate to a plan of school desegregation."/22\ For the first time, a federal court gave precedence to the harm of racial isolation, than to the language difference which had ostensibly been the basis for segregation.

The U.S. Supreme Court, in reviewing Keyes set another precedent regarding second minority groups intervening in a desegregation case. The Court found that proof of segregative intent on the part of the Denver school district with respect to Blacks raised a presumption that it had discriminated against Hispanic students as well./23\ The effect of this decision was that the school board was required to prove that it had not discriminated against the Hispanic intervenors, whereas

the original plaintiffs in the Denver case were required to prove that the school board had discriminated against them.

Efforts Against Linguistic Isolation

In addition to segregation by race, national origin minority students continued to suffer the discriminatory effects of linguistic exclusion, through laws requiring that public school instruction be in English only, or prescribing punishment for speaking languages other than English in school./24\ As a result, districts that failed to provide for limited English-proficient students let these children sink or swim. Students who did not acquire English through total immersion received instruction that was totally meaningless to them.

In a landmark decision, Lau v. Nichols (1973),/25\ the United States Supreme Court found that the San Francisco Unified School District had violated Title VI of the Civil Rights Act of 1964 by denying some 1,800 Chinese speaking students an education comprehensible to them. The Court held that children who cannot benefit from an education conducted solely in the English language must be afforded at least the opportunity to learn English, and at public expense. "Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education."/26\

The Court did not base its decision on the equal protection clause of the Constitution, but rather on HEW guidelines to Title VI issued in 1970:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

Similar language was later codified in the Equal Educational Opportunities Act of 1974,/27\ and all school districts are subject to its requirements.

The weakness of the Lau decision lies in the fact that it was based on a federal statute, rather than the Constitution. Consequently, compliance and enforcement

procedures can be revised or rescinded by administrative or Congressional action./28\

Further, the Lau decision offered only general guidance. Lower courts and local school districts were directed to design remedies according to their particular situations; "teaching English to students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others."/29\ The Court also cautioned, again citing HEW guidelines, that any program employed to deal with the language needs of national origin minority children "must be designed to meet such language skill needs as soon as possible and must not operate as an educational deadend or permanent track."/30\

A federal district court followed this rationale to reject a desegregation plan submitted in New York State. The court found the Project Avelino plan unacceptable because, in part, it provided no mechanism for the transfer of students out of the program when they had reached the level of English proficiency which would enable them to understand regular instruction in English./31\ The same court, in a later decision, extended Lau, finding that:

> denial of educational opportunities to a child in the first years of schooling is not justified by demonstrating that the educational program employed will teach the child English sooner than programs comprised of more extensive Spanish instruction. While the District's goal of teaching Hispanic children the English language is certainly proper, it cannot be allowed to compromise a student's right to meaningful education before proficiency in English is obtained./32\

Thus, it was a discriminatory practice to delay a child's education while s/he learns English.

REMEDIES

Educational Approaches

Several specific types of programs to remedy language isolation in schools have been implemented with varying degrees of success. As already noted, prior to 1968 most states had "English-only" provisions in their education codes. Consequently, the common approach to "teaching" English to non-English speaking students was "language submersion." This approach leaves it to the student to somehow acquire English skills. It often works with very young children, but it does not work for most other students. More importantly, courts have rejected the practice, in light of the decision in Lau.

The two most widespread methods for teaching English to language minority students are English as a Second Language (ESL) courses, and bilingual education. The goal of both approaches is to bring a child's comprehension of English to a level where she or he may participate effectively in regular English monolingual classrooms. The primary difference between the two approaches is their perspective on the use of the student's native language.

ESL evolved from the teaching of English as a foreign language./33\ This type of instruction leans heavily on audio-lingual methodology, using mechanical drill and practice, repetition and choral speaking. The ESL approach is useful in teaching persons who have had no exposure to the sound system of English, but it may be less appropriate in settings where a receptive understanding of English already exists, and where English is not in fact a "foreign" language to the student. Thus ESL is most effective in teaching English to Spanish monolingual adults or adolescents who already have a command of their native language.

Bilingual education utilizes the student's native language as a medium for substantive instruction and as a bridge to English proficiency. It is considered most successful where the student has not yet acquired literacy skills (reading and writing), but has extensive oral proficiency (speaking and comprehending) in the mother tongue. Using the bilingual approach, a young student's education is not delayed in content areas such as social studies, science and math.

Which ever method is selected, avoidance of student isolation and continuity in curriculum are crucial to the success of the program. A critical shortage of

skilled teachers and an incomplete understanding of the effectiveness of these programs have tended to undermine implementation efforts.

Judicial Approaches

Court-approved desegregation plans are as varied as the school districts in which they must be implemented. In order to fashion an appropriate remedy, a court must carefully examine the unique needs of a particular community. The type of remedy imposed by a court will depend heavily upon the extent of discrimination.

If the wrong committed by a school district was a refusal to teach English skills, the court may order an ESL program (considered the minimum requirement for language minority students)./34\ If the wrong was more extensive, ESL courses may not be an adequate response. Teaching students only English, while their English-proficient peers are receiving substantive instruction in science and social studies, will throw LEP students academically behind their peers from the very start of their school experience. Courts may view this delay as violative of statutes which govern federal assistance to education,/35\ and may well order bilingual education to correct discrimination.

Should the court find a history of cultural denigration along with racial isolation and linguistic exclusion, it may hold that a much more serious harm has been done. Such a combination of factors would require sweeping revision to the education practices applied to such students. Courts have ordered the inclusion of bicultural education as a corollary to bilingual programs to remedy pervasive and long standing cultural discrimination. This helps to ensure that the child's native language and culture are not demeaned as he or she learns to function in a new language./36\

Resolving the Goals of Integration and Meaningful Education for English-Limited Students

Desegregation plans need not jeopardize hard-won remedial or bilingual programs, many of which rely upon numerical concentrations of English-limited students for adequate funding./37\ The courts have implemented plans in which desegregation and bilingual programs work in concert, without risk to either goal. The challenge has been met by requiring assignment of bilingual students before other students, to assure clustering of

bilingual classes/38\; by ruling that bilingual programs must remain intact regardless of a final integration plan/39\; and by ruling that the school board take the responsibility to ensure that students in need of language instruction be placed in schools "in sufficient numbers to allow the program to continue."/40\ The effort is further enhanced on the local level, where school districts are beginning to devise programs to encourage multi-racial and multi-linguistic contact through magnet schools, magnet centers and learning development centers which attract students of diverse backgrounds.

In the words of Justice Warren: "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."/41\ The key to achieving equity for limited English proficient students is this flexibility in designing the remedy.

CONCLUSION

Equal educational opportunity for Hispanics and other language minority students is a critical issue in the educational reform movement of the 1980s. The school enrollments in major cities in the United States reflect the large percentages of Hispanics: New York, 30%; Los Angeles, 45%; San Antonio, 52%; Miami, 32%; and Hartford, 35%. Coupled with these figures are those multi-racial school districts which have recently or are currently devising integration remedies where Hispanic students outnumber Black students. These districts include Austin, Texas; San Diego, California; and Tucson, Arizona, to name a few./42\

For Hispanics, access to equal educational opportunity must be implemented at all levels. Impediments to racial and ethnic integration begin at the highest levels of school district administration, trickling down to the rank and file of teachers and support personnel. Hispanics are consistently underrepresented in these areas./43\

The fact that the remedies for racial isolation and linguistic isolation have been regarded as inconsistent reflects a misunderstanding of the fundamental needs of Hispanic students. The remedy for linguistic isolation is access to English. Implementation of this access is the crux of the problem. Poor bilingual instruction can be as bad, if not worse, than no bilingual

instruction/44\ and until school district personnel and state policy makers understand the ramifications of thorough English instruction for national origin minority students, equal access for these children will remain an elusive goal.

FOOTNOTES

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1. Lee v. Johnson, 404 U.S. 1214, 1216-17 (1971) (Douglas, J., discussing San Francisco).

2. 347 U.S. 483 (1954).

3. Hernandez v. Texas, 347 U.S. 475 (1954).

4. "U.S. Hispanics: The Rising Tide," San Francisco Chronicle, September 4, 1983.

5. Digest of Educational Statistics, 1983, National Center for Educational Statistics, Washington, D.C., 1983.

6. Treaties and Other International Agreements of the United States of America, 1977-1949, vol. 9, Washington, D.C., Government Printing Office, 1972.

7. The Conditions of Bilingual Education in the Nation, Report by the U.S. Commissioner of Education to the President and the Congress, Washington, D.C.: November 1976.

8. Id.

9. Digest of Educational Statistics, 1983, National Center for Education Statistics, Washington, D.C., 1982.

10. Id.

11. The Conditions of Bilingual Education in the Nation, Report by the U.S. Commissioner of Education to the President and the Congress, Washington, D.C.: November 1976.

12. Alan Pifer, "Bilingual Education and the Hispanic Challenge," p. 8, reprinted from Annual Report of the Carnegie Corporation, 1979.

13. The Condition of Education for Hispanics, Brown et. al., National Center for Education Statistics, Washington, D.C., 1982.

14. 42 U.S.C. sec. 2000d (1978).

15. Jorge C. Rangel and Carlos M. Alcala, "De Jure segregation of Chicanos in Texas schools," Harvard Civil Rights-Civil Liberties Law Review, vol. 7, no. 2, 1972, at 308-326.

16. For an analysis of the requirements of desegregation law and the stages of a typical suit, see Patricia Lines, "A Review of Constitutional Principles Governing School Desegregation Requirements," ECS publication number LEC-82-12: Denver, Colorado, November 1982.

17. 335 S.W.2d 790 (Tex. Civ. App. 1930), cert. denied, 284 U.S. 580 (1931).

18. 67 F. Supp. 544 (S.D. Cal. 1946), aff'd 161 F.2d 744 (9th Cir. 1947).

19. Civ. No. 388 (W.D. Tex., June 15, 1948).

20. 96 F. Supp. 1004 (D. Az. 1951).

21. Keyes v. School District No. 1, 521 F.2d 465, 480 (10th Cir. 1974), cert. denied, 423 U.S. 1066 (1976) (held in part, language ability is not a justification for segregation).

22. Id.

23. The Court explicitly held that:

> a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

Keyes, 413 U.S. 189 (1973).

24. Josue M. Gonzalez, "Coming of Age in Bilingual/Bicultural Education: A Historical Perspective," Inequality in Education, No. 19, p. 6, Center for Law and Education: Harvard University, 1975.

25. 414 U.S. 563 (1973).

26. Id. at 566.

27. 20 U.S.C.A. sec. 1703f.

28. Joseph H. Grant, J.D., and Ross Goldsmith, Bilingual Education and Federal Law: An Overview, p. 6, Dissemination and Assessment Center for Bilingual Education, Education Service Center: Austin, Texas, May 1979.

29. Lau v. Nichols, 414 U.S. 563, 566 (1973).

30. Id. at 568.

31. Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57 (E.D.N.Y. 1978).

32. Rios v. Read, 480 F. Supp. 14, 23 (E.D.N.Y. 1978). The court found this policy violated equal educational opportunities under Title VI of the Civil Rights Act of 1964, the Civil Rights Act of 1871, the Equal Educational Opportunities Act of 1974 and the Bilingual Education Act of 1974.

33. V. John and V. Horner, Early Childhood Bilingual Education, Modern Language Association, at 171, (1971).

34. Tasby v. Wright, 542 F. Supp. 134 (N.D. Tx. 1981).

35. Rios v. Reed, 480 F. Supp. 14 (E.D.N.Y. 1978).

36. Serna v. Portales Mun. Schools, 351 F. Supp. 1279 (D.N.M. 1972), aff'd, 499 F.2d 1147 (10th Cir. 1974).

37. In a concurring opinion in Lau v. Nichols, Justice Blackmun quite clearly indicated that a substantial number of language minority students in need of special education must be present in order to require a school district to provide such a program:

> I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

414 U.S. 563 at 572.

38. Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975).

39. United States v. Texas Educ. Agency, 532 F.2d 380, 398 (5th Cir. 1976).

40. Evans v. Buchanan, 416 F. Supp. 328, 360-61 (D. Del. 1976).

41. Brown v. Board of Education, 349 U.S. 294, 300 (1955).

42. Alan Pifer, "Bilingual education and the Hispanic Challenge," reprinted from Annual Report of the Carnegie Corporation, 1979, at 8-9.

43. Rangel, infra note 15.

44. Josue Gonzalez, "Research Issues, Needs, Capabilities," Desegregation and Education Concerns of the Hispanic Community, The National Institute of Education, Conference Report, Washington, D.C.: October 1977, p. 15.